

ability to obtain all the relevant evidence and would be so cumbersome that the purpose of the discovery rules would be effectively defeated." Id. at 866, n.8. The Board concluded that the Presiding Officer's actions were clearly prejudicial to the compilation of an adequate record in the proceeding, and remanded the case for a new trial. Id. at 867.

38. Further, the decision in the Bunker-Ramo case emphasized the critical public interest concerns that must be satisfied in rulings involving discovery in common carrier complaint proceedings.

The significance of the instant complaint, which alleges discrimination by a common carrier in favor of its wholly-owned competitive subsidiary, involves grave public interest questions which extend far beyond the private rights of Bunker-Ramo and Western Union.... Moreover, it is quite apparent that Western Union is the only source of much of the evidence which is essential to a complete record in this proceeding. Furthermore, Western Union has already demonstrated that it cannot be expected to voluntarily disclose pertinent facts and information which it considers to be adverse to its interests.^{4/} The Presiding Officer's summary denial of Bunker-Ramo's motion for discovery arbitrarily prevented it from obtaining the full and fair hearing contemplated by the Commission Id. at 866.

4/ See Roebling v. Anderson, 257 F.2d 615 (1958), cert. denied, 366 US 918 (1961), where the court held discovery appropriate in a similar circumstance.

39. The decision in the Bunker-Ramo case is controlling in the instant proceeding. Here, TMC is being denied the use of effective discovery because of rulings by the Presiding Officer that clearly emphasize "form over substance." Moreover, as in Bunker-Ramo, there are critical public interests raised by this complaint. At issue in this proceeding, in addition to the private rights between Complainant and Defendant, is the question of

whether Pacific Bell denied a small interexchange carrier equal access at the most critical stage of that policy's implementation. Moreover, the issue of equal access involved in this proceeding centers on the first initiation of equal access in the San Diego LATA, an event never again to take place. Given the immense public importance of equal access, not only to the Commission's goals of instilling effective competition in the post-Divestiture world of interexchange telecommunications, but also to the remedial purposes of the Modified Final Judgment explicitly mandating such access as a means to rectify the anti-competitive environment created by Defendant's past participation in the monopoly provision of interexchange services, the issues raised transcend the purely private interests of the litigants, as they did in Bunker-Ramo.

40. These critical public policy concerns should not be subordinated to concerns over a procedural misunderstanding that has harmed no one. And, unlike the Presiding Officer's attempted reliance on substituting voluntary discovery efforts found nonetheless to be reversible error in Bunker-Ramo, the Presiding Officer's begrudging tolerance of "voluntary" discovery efforts in this case has denuded even that faulty procedure of any effectiveness as a substitute for compulsory discovery under the aegis of an impartial presiding officer. Instead, TMC is systematically being blocked from obtaining "the full and fair hearing contemplated by the Commission's designation order." Bunker-Ramo at 865-866.

IV. The Need for Discovery Requested Has Been Documented.

41. In its request to the Presiding Officer for permission to file an appeal, TMC justified its need to engage in further discovery in order to determine Pacific Bell's actions or inactions regarding the equal access issues. For example, TMC showed that the deposition of Mr. Cox, for whom a subpoena was filed on August 2, 1993, was necessary for the following reasons:

At the time period in issue in this complaint, Mr. Cox was Executive Vice President of the PacBell Marketing department that modified, on an informal basis, PacBell's 1985 Routing Policy for the San Diego LATA. The original written policy was designed on an engineering basis to rely on direct trunking from end offices, the changed policy was as initiated by Mr. Cox' department, was to home on the access tandem, the 90T.

The Deposition of Mr. Cox is being sought to explore his purpose in changing the routing policy in 1985. TMC contends, based on previous documents obtained in discovery, that the change was based on PacBell's own internal plans to expand its operations after divestiture. Specifically, Pacific Bell needed the access tandem and a change in the 1985 Routing Policy (1) because all direct trunking routing homed on AT&T's 4ESS switches and Pacific Bell had no control over these switches and hence no opportunity to implement or plan for its own expansion of services in the LATA; (2) Pacific Bell could not retain, as opposed to defaulting to AT&T, the operator services business in the LATA, if it did not use the access tandem because AT&T had all operator services located in its 4ESS switches; and (3) Pacific Bell could not control and manage its own intraLATA traffic without the access tandem because once again it would be routed under the 1985 Routing Policy to the 4ESS' switches of AT&T.

TMC has just learned through receipt on August 2, 1993 of a memorandum from PacBell, that the informal change to the 1985 Routing Policy was formalized on or about April 30, 1987. As that memorandum (a copy of which is attached hereto as Exhibit A) indicates, Mr. Cox was directly involved in this change, as were Mr. Bandler and others. As the changes in the routing policies and Pacific Bell's true motivations therefore are key elements supporting Complainant's contentions that

Pacific Bell violated its equal access obligations the deposition of Mr. Cox is important to an explanation of that policy.^{21/}

V. The Officer's Rulings Are Based On an Assumed, And Therefore Erroneous Misunderstanding of the Commission's Common Carrier Complaint Rules, the Predesignation History of this Proceeding and A Preconceived and Unjustified Bias Against TMC.

42. It is clear from a review of the Presiding Officer's discovery rulings that the Presiding Officer placed considerable reliance on the predesignation discovery he assumed, but did bother to confirm, took place between the parties. This assumption is in turn based on a misplaced understanding or simple lack of knowledge of the severe limitations on pre-designation discovery under the formal complaint rules of the Commission.^{22/} And finally, it appears that the Presiding Officer has indulged himself in determining the poor character qualifications of TMC based on the

21/ TMC also demonstrated that the depositions of Mr. Bandler and Mr. Lockton are essential to Complainant's case. Each of these individuals were at a similar management rank as Mr. Cox at the time the 1985 Routing Policy was changed, and therefore need to be examined about their participation in and knowledge of that policy change and the implementation thereof. Finally, the depositions of Mr. Dennis Wheatley and Ms. Helga Post are requested because both of these individuals possess information concerning Pacific Bell's policies concerning the provisioning of equal access on a direct trunking, rather than on an access tandem basis, and on Pacific Bell's deliberations and decisions concerning TMC's requests for direct trunking.

22/ The Commission's common carrier complaint rules, 47 C.F.R. §§ 1.720-1.734, limit the discovery that is available as a matter of right to the propounding of 30 interrogatories, to be served within 30 days of the date that a reply to the complaint is due to be filed by the Defendant. All other forms of discovery are considered to be "extraordinary" and require that a motion be filed and granted by the Bureau before such discovery may be permitted.

mere assertions of misconduct by two former TMC employees who claim they are in need of immunity before testifying in this proceeding.^{23/}

43. In each of his rulings, including the Order denying TMC leave to file an appeal, the Presiding Officer emphasized the fact that the parties previously responded to interrogatories, exchanged documents, and obtained deposition testimony during the four year period since TMC's complaint was filed. Based on these overt misimpressions of the scope of predesignation discovery, it is clear that the Presiding Officer is of the opinion that the need for and importance of post-designation discovery is unnecessary.^{24/} Nothing could be further from the truth.^{25/}

VI. Conclusion

44. The premises considered, TMC respectfully submits that the Review Board presently grant this Petition and TMC leave to appeal the Presiding Officer's interlocutory discovery rulings.

^{23/} See n. 16, supra.

^{24/} The Presiding Officer's interlocutory discovery rulings also mistakenly observe that "the parties have had over four years to perfect their trial preparations." Memorandum Opinion and Order, 93M-506 (rel. August 6, 1993). To the contrary, for all but the last year prior to designation, TMC had only a very limited expectation that its complaint would be designated for hearing. In fact, prior to a designation order being issued in this proceeding, a common carrier complaint had not been set for hearing for over a decade. Instead, the Bureau addresses complaints either through encouraging settlement efforts, or on the basis of the parties' written submissions. Under these circumstances, it is clearly unreasonable to expect TMC to utilize the past four years to prepare for a trial that was unlikely at best to ever materialize.

^{25/} See discussion under "Predesignation Background," supra at ¶¶ 1-13.

On appeal, the Review Board should reverse the Presiding Officer's rulings in their entirety and TMC should be permitted to engage in the discovery previously requested and any reasonable and necessary follow-up. In addition, the Review Board should order or itself fashion a revised hearing schedule following its actions requested herein to allow the parties sufficient time to reschedule depositions, arrange for document production and prepare their direct cases.^{26/}

Respectfully submitted,

CLARK-BADER, INC. dba TMC LONG DISTANCE

By 

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^{26/} Any quotations of the Presiding Officer which appear in this Petition are based on the best recollection of TMC's lead counsel.

EXHIBIT "A"

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GEORGE F. GALLAND (1910-1985)

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October 2, 1992

VIA Telecopy and First Class Mail
415-543-0418

Nancy C. Woolf, Esq.
Attorney, Pacific Bell
Legal Department
140 New Montgomery Street
San Francisco, CA 94105

Dear Nancy:

As we discussed earlier, this is an informal request to depose the named individuals in the Clark-Bader, Inc. v. Pacific Bell, FCC E-89-95 complaint proceeding.

The five individuals and the titles they hold or formerly held are -

Dennis Wheatley, Account Executive/Marketing Rep for TMC
Frank Biava [Title unknown]
C.L. Cox, Executive VP of Operations,
M.L. Bandler, VP Network Engineering & Planning, and
J.D. Lockton, Executive VP Marketing.

Please call me to discuss the scheduling of these five individuals. We prefer the order of depositions indicated above, if this can be reasonably arranged.

GALLAND, KHARASCH, MORSE & GARFINKLE, P. C.

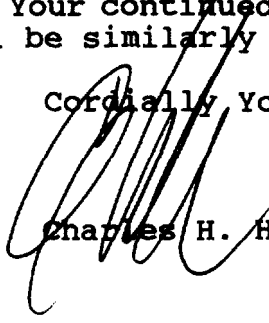
Nancy C. Woolf, Esq.

October 2, 1992

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Please let me know if PacBell will make these persons available so we may discuss scheduling of their depositions. The professional manner in which your office has scheduled previous depositions is appreciated. Your continued cooperation in order to advance this proceeding will be similarly appreciated.

Cordially Yours,



Charles H. Helein

EXHIBIT "B"

GALLAND, KHARASCH, MORSE & GARFINKLE, P. C.

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October 19, 1992

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VIA TELECOPY AND FIRST CLASS MAIL
415-543-0418

Nancy C. Woolf, Esq.
Attorney, Pacific Bell
Legal Department
140 New Montgomery Street
San Francisco, CA 94105

Dear Nancy:

This will confirm your understanding for the request by Complainant to depose Dennis Wheatley.

As you requested, this will specify the reasons the Complainant in E-89-85 is seeking to depose Frank Biava, C.L. Cox, M.L. Bandler, and J.D. Lockton.

We seek to discover the basis of Mr. Biava's understanding of Pacific Bell's policies concerning resellers back at the beginning of equal access in the 1985 and following time period and why he, as an employee of Pacific Bell, would have voiced a conclusion that Pacific Bell would not or did not support resale or resellers at that time, whether the purported retraction of such statements truly reflected Pacific Bell policies or were merely efforts on damage control.

The purpose of Mr. Cox's deposition is to discover the background on, and Mr. Cox's understanding of, the September 23, 1985 routing policy for IEC equal access trunk groups, its impact

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Nancy C. Woolf, Esq.

October 19, 1992

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on IECs and his understanding of any changes therein and the impact of such changes on IECs, particularly small resellers.

The purpose of Mr. Bandler's deposition is to discover the background on, and Mr. Bandler's understanding of, the technology/products chosen by Pacific Bell's Network Engineering & Planning Division to implement the September 23, 1985 routing policy.

The purpose of Mr. Lockton's deposition is to discover the background on, and Mr. Lockton's understanding of, the marketing strategies underlying the September 23, 1985 routing policy for IEC equal access trunk groups and the causes, reasons and factors, as well as his understanding thereof, for any changes in that routing policy.

Previous depositions indicate that the witnesses offered by Pacific Bell on these areas of central importance to the proceeding either claimed not to have or did not have responsibility or accountability for these areas for which Messrs. Cox, Bandler and Lockton have no such excuse. Hence, the record needs to be enlarged to obtain further facts from those individuals Complainant has been able to identify as most likely possessing the knowledge, responsibility and accountability that will aid the investigation of Complainant's claims.

Best Regards,



Charles H. Helein

CERTIFICATE OF SERVICE

I, Suzanne Helein, hereby certify that on this 19th day of August, 1993, I caused a true and correct copy of the foregoing "Petition for Extraordinary Relief and Expedited Consideration" in CC Docket No. 93-161, File No. E-89-85, to be sent to the following in the manner indicated:

Via Federal Express to:

James P. Tuthill, Esquire
Nancy C. Woolf, Esquire
Pacific Bell
140 New Montgomery Street
Room 1530-A
San Francisco, CA 94105

and by hand delivery to:

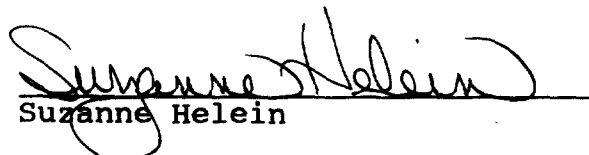
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The Honorable Walter C. Miller
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